Supreme Court, U. S.
FILED
OCT 6 1976
MICHAEL RODAK, JR., CLERK

No. 76-348

In the Supreme Court of the United States

OCTOBER TERM, 1976

C. T. AND DORIS M. JENNEMAN, PETITIONERS

v.

HOWARD A. DAWSON, JR., ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF PROHIBITION AGAINST THE JUDGES OF THE UNITED STATES TAX COURT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-348

C. T. AND DORIS M. JENNEMAN, PETITIONERS

v.

HOWARD A. DAWSON, JR., ET AL.

ON MOTION FOR LEAVE TO FILE PETITION FOR A WRIT OF PROHIBITION AGAINST THE JUDGES OF THE UNITED STATES TAX COURT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

After determining a deficiency in petitioners' income tax for 1971, the Commissioner of Internal Revenue issued a notice of deficiency to them pursuant to Section 6212 of the Internal Revenue Code of 1954. Petitioners thereupon invoked the jurisdiction of the United States Tax Court by filing a petition in that court for redetermination of the deficiency.[1]

Petitioners seek a writ of prohibition against the judges of the United States Tax Court enjoining them from

---

[1]On May 7, 1976, petitioners first filed a similar motion for leave to file a petition for a writ of prohibition in this Court. However, the Court refused to docket the case because petitioners had not exhausted their lower court remedies. Petitioners did not press their constitutional claims in the Tax Court, but filed a petition for a writ of prohibition against the judges of the Tax Court in the Court of Appeals for the District of Columbia Circuit. That court denied their petition on July 26, 1976.

proceeding with their pending case. Petitioners argue that because the Tax Court is organized under Article I of the Constitution, it is not constitutionally capable of redetermining the deficiency and that if it did so, it would be "usurping" (Pet. 3) the jurisdiction reserved to Article III courts.

1. "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. [A]s extraordinary remedies, they are reserved for really extraordinary cases." *Ex parte Fahey,* 332 U.S. 258, 259 260; *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 383-385. Moreover, these extraordinary writs "cannot be used as substitutes for appeals." *Id.* at 383; *Will* v. *United States,* 389 U.S. 90, 96; *Parr* v. *United States,* 351 U.S. 513, 520. There is nothing extraordinary about petitioners' claims of the unconstitutionality of the Tax Court that calls for mandamus. Since it cannot be said that the Tax Court is "clearly" without jurisdiction, this case can be considered by the Tax Court and resolved "by [an] appeal in the ordinary way." *Ex parte Davis,* 262 U.S. 274, 276.

2. There is no merit to petitioners' assertion (Motion, pp. 3-4) that the Tax Court is unconstitutionally usurping the powers of an Article III court. Pursuant to Section 951 of the Tax Reform Act of 1969, 83 Stat. 487, which amended Section 7441 of the Internal Revenue Code of 1954 (26 U.S.C.), the status of the Tax Court was changed to a "court of record" established "under article I of the Constitution of the United States."[2] As this Court stated

[2]Prior to the Tax Reform Act of 1969, the Tax Court had been an "independent agency in the Executive Branch of the Government." See Section 7441 of the Internal Revenue Code of 1954 (26 U.S.C.) before it was amended by Section 951 of the Tax Reform Act of 1969. However, Section 961 of the 1969 Act provides that the "United States Tax Court * * * is a continuation of the Tax Court of the United States as it existed * * * [under prior law] * * *, and [that] no loss of rights or powers, interruption of jurisdiction, or prejudice to matters pending" before the Tax Court was to result from the change in that court's status.

in *Ex parte Bakelite Corp.,* 279 U.S. 438, 449, "it long has been settled that Article III [of the Constitution] does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may [also] create [other] inferior courts" of limited jurisdiction. See *Williams* v. *United States,* 289 U.S. 553, 565. The jurisdiction of these so-called "legislative courts" often extends to matters which are susceptible to judicial determination but which do not require the exercise of the judicial power of an Article III court. *Ex parte Bakelite Corp., supra,* 279 U.S. at 449, 451-452; *Williams* v. *United States, supra,* 289 U.S. at 565-566; *Burns, Stix Friedman & Co.* v. *Commissioner,* 57 T.C. 392, 398. Cf. *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 548-552. See also *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, 722-728.

The United States Tax Court is such an Article I court. There is no constitutional right to a judicial hearing before payment of a tax. *Phillips* v. *Commissioner,* 283 U.S. 589, 595-597; *Nash Miami Motors, Inc.* v. *Commissioner,* 358 F. 2d 636, 638-639 (C.A. 5), certiorari denied, 385 U.S. 918. See *Willmut Gas & Oil Co.* v. *Fly,* 322 F. 2d 301, 303 (C.A. 5). In establishing the Tax Court as a special pre-payment forum for resolving certain types of federal tax cases, Congress was accordingly entitled to "attach * * * such conditions as it deem[ed] proper, even * * * requiring that * * * [such] suits be brought in a legislative court specially created [for this purpose]." See *Ex parte Bakelite Corp., supra,* 279 U.S. at 451-452. While both the United States Tax Court and its predecessors

under prior law have always exercised their special jurisdiction over tax deficiency cases in a "judicial" manner,[3] this limited jurisdiction has never involved matters " 'inherently' " or singularly committed to the "judicial power" of Article III courts. See *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 549.

It is therefore hardly surprising that, both before and after the Tax Reform Act of 1969, the courts have upheld the constitutionality of the Tax Court against the same claims made by petitioners. See, *e.g., Stix Friedman & Co.* v. *Coyle,* 467 F. 2d 474 (C.A. 8); *Nash Miami Motors, Inc.* v. *Commissioner, supra; Martin* v. *Commissioner,* 358 F. 2d 63 (C.A. 7), certiorari denied, 385 U.S. 920; *Willmut Gas & Oil Co.* v. *Fly, supra; Burns, Stix Friedman & Co.* v. *Commissioner, supra.*

It is respectfully submitted that the motion for leave to file a petition for a writ of prohibition should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1976.

---

[3]See *Burns, Stix Friedman & Co.* v. *Commissioner, supra,* 57 T.C. at 400-402 (Raum, J., concurring).